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SUPREME COURT, U.S.

NO. 80-6675

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1980

VERNON EUGENE McMANUS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I. SHOULD THIS COURT REFUSE TO CONSIDER A MATTER TO WHICH THE STATE COURT FOUND PETITIONER HAD MADE A PROCEDURAL DEFAULT UNDER STATE LAW?

II. DOES THE ADMISSION OF EXTRANEOUS OFFENSES AT THE PUNISHMENT PHASE OF A CAPITAL MURDER TRIAL VIOLATE DUE PROCESS?

III. DID PETITIONER RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to Petitioner's Writ of Certiorari files this its Brief in Opposition.

OPINION BELOW

Petitioner's conviction for capital murder was affirmed on December 5, 1979, in McManus v. State, 592 S.W.2d 505 (Tex.Crim.App. 1979). Motion for rehearing was denied January 16, 1980. A post-conviction

writ of habeas corpus was denied on February 24, 1981, after an evidentiary hearing in the state trial court.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claims upon the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Also involved is Article 37.071, Vernon's Ann. C. C. P.

STATEMENT OF THE CASE

Petitioner was indicted for the offense of capital murder on July 29, 1976. On May 19, 1977, the jury found Petitioner guilty of murder of Paul Cantrell for remuneration. The record reflects that Petitioner, acting with Paula Cantrell Derese, daughter of the victims, plotted to kill and eventually murdered Paul and Mary Cantrell for the proceeds of their life insurance and estate. The jury answered affirmatively the special issues submitted pursuant to Article 37.071, Vernon's Ann. C. C. P. and, accordingly, punishment was assessed at death. The facts of the case are set out in detail in the opinion affirming Petitioner's conviction. (See, McManus v. State, attached as Petitioner's Appendix A.)

Petitioner filed a post-conviction writ of habeas corpus in the state convicting court, alleging that he received ineffective assistance of counsel as his lead trial counsel, Don Smith, had a conflict of interest in his representation of Petitioner. Petitioner claimed that Smith had been involved in a sexual relationship with Petitioner's ex-wife, Regina, and that Smith had filed a divorce suit against

Petitioner after the trial. An extensive evidentiary hearing was held, at which time testimony was adduced from some twenty witnesses. The trial court entered detailed findings of fact and concluded that the evidence did not support Petitioner's claims. The Court of Criminal Appeals subsequently denied relief.

SUMMARY OF THE ARGUMENT

This Court should refuse to consider a matter to which the state court found Petitioner had made a procedural default under state law. Petitioner failed to object to the trial court's excusing juror Blanchard on the grounds now presented. The state has a legitimate interest in requiring the parties to present to the trial court their grounds for complaint. This is especially true where, as here, the juror was unable to state that he could be fair and impartial on the question of guilt or innocence. Since Petitioner did not inform the trial court that he desired further inquiry into the juror's qualifications on constitutional grounds, he should be precluded from making that complaint now.

The admission of extraneous offenses at the punishment phase of a capital murder trial comports with due process. This evidence is legally relevant to the issues presented to the jury. This Court upheld the Texas statutroy scheme because it provided for the admission of all relevant evidence concerning the issue of punishment. Petitioner never contended at trial that he was surprised by the introduction of his past criminal acts.

After an extensive evidentiary hearing, Petitioner failed to prove that there was a conflict between him and his retained attorney. The detailed factual findings of the state trial court are amply supported

by the record. Petitioner has failed to establish that an actual conflict of interest adversely affected his lawyer's performance.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION

Rule 17 of the Rules of the Supreme Court provides that a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reason in this case and none exists.

II.

THIS COURT SHOULD REFUSE TO CONSIDER A MATTER TO WHICH THE STATE COURT FOUND PETITIONER HAD MADE A PROCEDURAL DEFAULT UNDER STATE LAW

Petitioner contends that venireman Richard Reid Blanchard was excused in violation of the doctrine of Witherspoon v. Illinois, 391 U.S. 510 (1968). The record reflects that Blanchard was the second juror selected and sworn in this case. Jury selection continued and after a few days, Blanchard approached the trial court concerning his reluctance to participate in a capital murder case. The trial court held a hearing to determine the extent of Blanchard's opposition to capital punishment. After substantial examination by the court, during which Blanchard was unable to state that he could be a fair and impartial juror on the issue of guilt or innocence due to his reservations about capital punishment, the court excused Blanchard from jury service. Petitioner's sole objection to this action was that it was error for the court to excuse a juror who had

been impaneled and sworn, and that a juror had an "absolute right" to change his mind on issues after being selected. On appeal, the Court of Criminal Appeals found that Petitioner had failed to preserve any error under Witherspoon as to the exclusion of this juror, as Petitioner had failed to make a contemporaneous objection on that ground at trial.

To preserve error pursuant to Texas procedural law, it is well settled that a contemporaneous objection must be made at trial on the same ground as that presented on appeal. Watkins v. State, 572 S.W.2d 339 (Tex.Crim.App. 1978); Williams v. State, 549 S.W.2d 183 (Tex.Crim.App. 1977); Genzel v. State, 415 S.W.2d 919 (Tex.Crim.App. 1967).

This Court has consistently declined to review matters to which no proper objection was made at trial in compliance with state procedural requirements. The failure of a defendant to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court. Michigan v. Tyler, 436 U.S. 499 n.7 (1978). That the state has a legitimate interest in requiring the parties to apprise the trial court of their grounds for complaint is well settled. See, Wainwright v. Sykes, 433 U.S. 72, (1977); Estelle v. Williams, 425 U.S. 501 (1976); Davis v. United States, 411 U.S. 233 (1973). The state's legitimate interest in this procedural rule is especially strong in the instant case, where the juror excused was unable to state that he could be fair and impartial on the question of guilt or innocence. In Lockett v. Ohio, 438 U.S. 586 (1978), this Court affirmed its position that jurors who cannot make impartial decisions

as to guilt or innocence because of their attitudes about the death penalty may properly be excluded for cause consistent with the principles of Witherspoon. Thus, if Petitioner had a complaint that the juror's responses were insufficient to support the exclusion of this juror consistent with constitutional principles, it was incumbent upon Petitioner to present this to the trial court, in order to give all parties an opportunity to pursue the matter further. Having failed to do so, Petitioner should not be heard to make a complaint now. This Court should decline to review a matter to which no proper objection was made in the state court.

III.

THE ADMISSION OF EXTRANEOUS OFFENSES AT THE PUNISHMENT PHASE OF A CAPITAL MURDER TRIAL DOES NOT VIOLATE DUE PROCESS

The record reflects that at the punishment phase of the trial, evidence was admitted that Petitioner had previously attempted to commit extortion and had conspired to murder other acquaintances. The admission of evidence relevant to the jury's determination of the issues at the punishment phase of a capital murder trial does not violate due process. The second statutory question submitted to the jury at the punishment phase of a capital murder trial requires the jury to make a prediction of the future criminal conduct of the defendant. Article 37.071(b)(2), Vernon's Ann. C. C. P. This Court approved this statutory death penalty scheme in Jurek v. Texas, 428 U.S. 262 (1976), specifically stating:

> What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced. 438 U.S. at 277.

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas FEB 25 1981

Dear Sir:

This is to advise that the Court has denied without written order the application for writ of habeas corpus.

Vernon Eugene McManus

in Application No. 7442

Sincerely yours,

Thomas Lowe, Clerk

Evidence relevant to the jury's determination of the defendant's future criminal conduct, including his prior criminal acts, is properly admissible at the punishment phase of a capital trial. Jurek v. Texas, supra. [1] At no time during trial or appeal did Petitioner claim that he was surprised by the introduction of this evidence. Petitioner's contentions that the admission of extraneous offenses violates state statutes is solely a matter of state law and does not present a federal question for this Court's review.[2] See, Henry v. Mississippi, 379 U.S. 443 (1963); Rice v. Olson, 324 U.S. 786 (1945).

IV.

THERE WAS NO CONFLICT OF INTEREST BETWEEN PETITIONER AND ONE OF HIS RETAINED COUNSEL AND PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

Petitioner contends that he received ineffective assistance of counsel at trial because one of his attorneys, Don Smith, engaged in sexual relations with Petitioner's ex-wife, Regina, and because Smith filed a divorce action for Petitioner and Regina after the conclusion of the trial. After an extensive state habeas corpus hearing, the trial court entered factual findings and concluded that Petitioner had failed to establish that he had received ineffective assistance of counsel either because of a conflict of interest or inadequate performance by his attorneys at trial. (See, Petitioner's Exhibit C). The findings of the trial court are amply supported by the record.

Although the evidence adduced showed that after the conclusion of the trial, Smith and Regina engaged in sexual intercourse, the evidence is undisputed that they had absolutely no relationship

whatsoever during the course of the trial, and that their relationship only developed well after the conclusion of the trial. The record reflects that the first encounter between Smith and Regina occurred a few days before the trial court finally ruled upon the Motion for New Trial. According to the record, the motion for new trial was a form motion which presented no specific grounds for review; the evidence is undisputed that the attorneys had no grounds for a new trial other than those upon which they intended to base their appeal; it is also undisputed that the reason Smith filed a motion for new trial was to delay the time before Petitioner was transferred to death row, enabling Petitioner to remain in Harris County for as long as possible. The record does not support Petitioner's claim that Smith was establishing a relationship with Regina at a critical stage in the criminal process, or that Smith in any way ever "abandoned" Petitioner.

The record also reflects that after the conclusion of the trial, Smith filed a petition for dissolution of the marriage of Petitioner and Regina. The undisputed evidence shows that during the course of Petitioner's lengthy trial, the marriage of Petitioner and Regina deteriorated, due to Petitioner's repeated adultery during that time. Regina decided to divorce Petitioner, but agreed to wait until the conclusion of the trial to do so. Petitioner entered into an agreement with Smith that Smith, as a personal favor, would handle the divorce at no cost to either Petitioner or Regina. The divorce was to be filed in Regina's name, since Petitioner was incarcerated. The parties agreed that the divorce was uncontested, which was the only reason Smith agreed to handle the case. Subsequently, when the

action became contested due to Regina's desire to change her daughter's name, Smith withdrew from the case on account of a possible conflict of interest, and was not further involved in the case.

The record supports the trial court's findings that the evidence is insufficient to establish that there existed a conflict of interest between Petitioner and his trial attorney. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. Cuyler v. Sullivan, __ U.S. __, 100 S.Ct. 1708 (1980). This Petitioner has wholly failed to do so.

CONCLUSION

For the reasons discussed above, Respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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FOOTNOTES

1/ Contrary to Petitioner's assertion, the Court of Criminal Appeals has held that hearsay evidence is not admissible under this statute. Further, Article 37.071(a) supra also prohibits the admission of evidence obtained in violation of federal constitutional or state law.

2/ Petitioner argues that evidence of extraneous offenses is unreliable which is why such evidence is generally inadmissible in other cases. This argument ignores the rationale for the exclusion of extraneous offenses generally. Evidence of other acts of misconduct is generally not admissible at other criminal trials because it is not legally relevant to the issues, not because it is deemed unreliable. See, Sanders v. State, 604 S.W.2d 108 (Tex.Crim.App. 1980); Murphy v. State, 587 S.W.2d 718 (Tex.Crim.App. 1980). It is when the prior acts of misconduct become legally relevant, as in the punishment phase of a capital trial, that the evidence becomes admissible.

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PROOF OF SERVICE

I hereby certify that on the 15th day of June, 1981, one copy of the Brief in Opposition were mailed, postage prepaid, to Mr. Stanley Schneider, 3000 Richmond Avenue, Suite 530, Houston, Texas 77098. All parties required to be served have been served.

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APPEARANCE OF COUNSEL

The Clerk will enter my appearance as counsel for The State of Texas who in this Court is Respondent. I certify that I am a member of the bar of the Supreme Court of the United States.

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